IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

Docket No. 175.

FILED

JUN 21 1953

HAROLD B. WILLEY, Clerk

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, LOCAL No. 191, ELLIS G. BARNETT, EUGENE F. GRIGGS, MATTHEW W. DAVIS, SAM EISELE, EDWARD H. WEILER, ANNE J. PETERS, FRED R. WOLF, MRS. SAM EISELE, MRS. HELEN MORGAN, MRS. ALBERT B. CAMPBELL,

Petitioners,

vs.

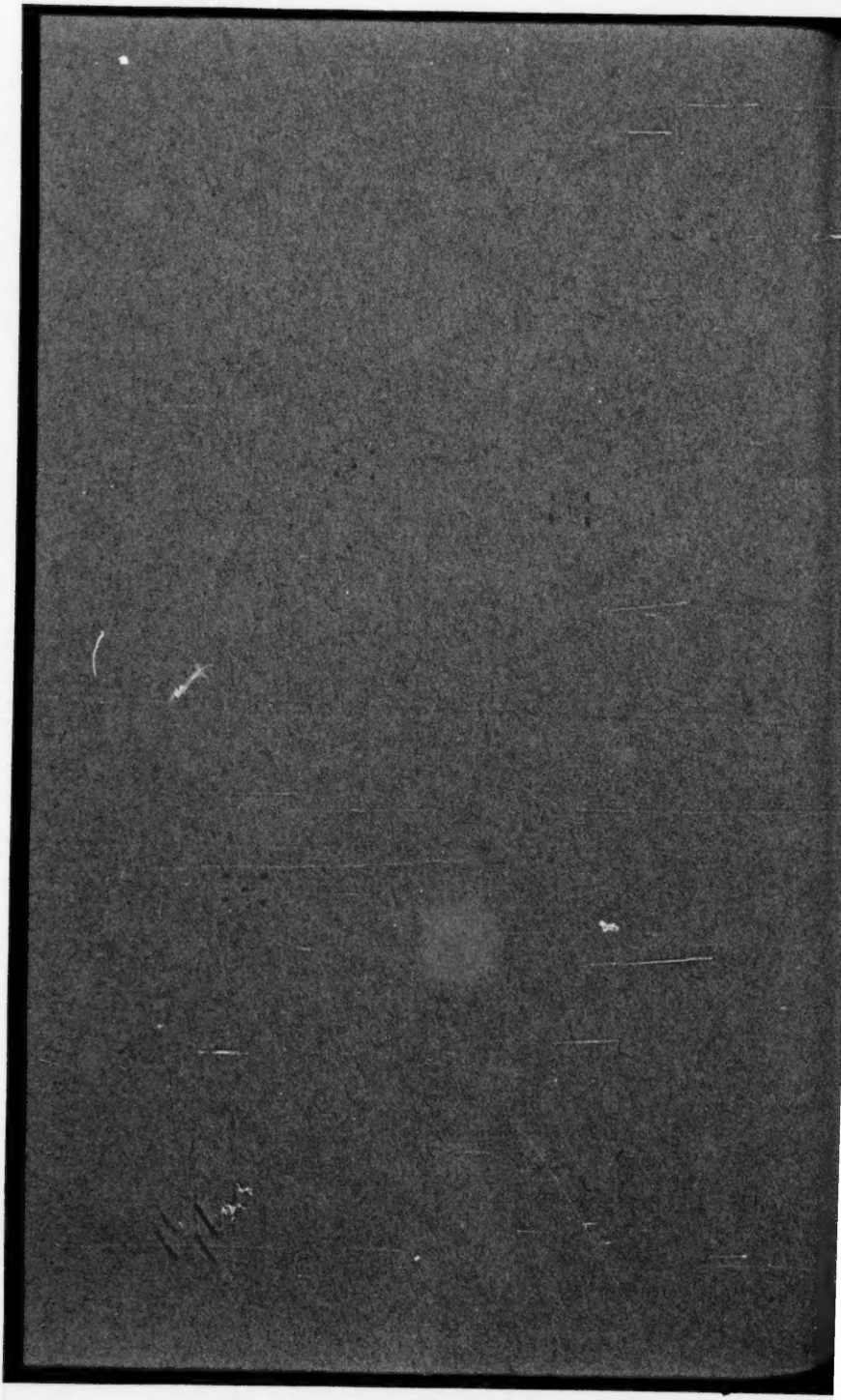
BLUE BOAR CAFETERIAS COMPANY, INC.,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITIONERS' PRAYER FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

Docket No. 175.

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, LOCAL No. 181, ELGIN G. BARTLETT, EDMUND F. GRIMES, MATTHEW W. DAVIS, SAM EZELLE, EDWARD H. WEYLER, ARTH J. POTTER, FRED B. WOLF, MRS. SAM EZELLE, MRS. HELEN MORGAN, MRS. AILEEN B. CAMPBELL,
Petitioners,

VS.

BLUE BOAR CAFETERIA COMPANY, INC.,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITIONERS' PRAYER FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY.

STATEMENT.

In the so called "summary statement" of petitioners, there are some glaring inaccuracies and misstatements. These require clarification and correction.

On page 3 of the petition, the statement is made that Blue Boar refused to permit the Commissioner of Industrial Relations to conduct an election. Peti-

tioners neglect to point out that less than two weeks prior to this refusal, namely on October 7, 1949, Blue Boar had offered to permit the Commissioner of Industrial Relations to conduct an election among its employees and the Union refused (R. 239-241). The Court of Appeals noted this in its opinion (254 S. W. 2d 335, 336; R. 49).

Petitioners also make the statement that the Commissioner of Industrial Relations had satisfied himself that the union did represent "a substantial number of employees of the company" (Pet. 3). This fact has never been proven. Just the contrary has been shown at every hearing. In July, 1950, the Chancellor found as a fact,

> "From the proof taken and the affidavits filed, it is conclusively shown that no employee of the plaintiff is a member of the defendant union * * *" (R. 12).

The petition, page 8, contains a statement,

> "Further, in the period from May 30 to June 2, 1952, five *of the seventeen employees who were members of the Union* were discharged by the company" (R. 250, 252, 253, 254, 255).

The emphasized portion of that statement without explanation would appear an attempt to mislead this Court into believing there were seventeen employees members of the Union. There is no support in the Record for this. The only time that the word "seventeen" was ever mentioned in the testimony was by the Union's business agent, Harrod, on direct examination when he stated (R. 245):

> "We called a meeting down town and there were approximately seventeen people attended that meeting."

At this hearing in September, 1952, the Chancellor found that only five of the employees of Blue Boar were ever proven to have signed Union authorization cards. He points out that the Union claims it represented others, but it never proved that fact (R. 43). The Chancellor stated in his finding,

> "Counsel for the defendant insisted that other employees of the plaintiff had signed authorization cards and offered to exhibit such cards to the presiding Judge, but not to opposing counsel or parties. Whereupon the court informed the counsel that he didn't wish to see the cards unless they were made a part of the record. * * * *It is to be noted that this was a claim of counsel and that the defendant did not introduce any signed authorization cards other than the five produced in evidence."* (Emphasis supplied.)

On page 4 of the petition, the claim is made that the members which the Union alleged to have signed up, "steadily dwindled as they became discouraged or were fired or quit their employment with the company." Reference is given to the Record, pages 163 and 12. We have diligently searched the entire record and can find no foundation at all for such a statement. Certainly the referenced pages do not support such a statement.

Again on page 4 of the petition, the claim is made that the Chancellor in 1950, refused to give weight to the fact that the Union had represented a substantial

number of the employees at the inception of the controversy. That is absolutely incorrect. The Union never attempted to prove, in 1950, that it represented any employee of Blue Boar. As a matter of fact, it offered absolutely no proof at that time and the record clearly shows this. The Union offered only two affidavits and they appear in the record. This is duly noted in the order of the Jefferson Circuit Court, entered on July 13, 1950 (R. 14).

Petitioners, in discussing the discharges and termination of the employees in 1952, make this statement on page 9 of the petition:

> "That such discharges occurred within a short time after an anti-union and pro-company employee learned of the Union activity" (R. 268, 274, 273, 283).

This statement is utterly false and untrue. The employee referred to as "anti-union and pro-company" was Laura Brown, a negro bus girl. After the Union by its testimony tried to insinuate that Laura Brown was an informant, counsel for Blue Boar called her to the stand in rebuttal. She testified that the first she ever learned of "Union activity" was Saturday after this Friday hearing when she read the newspaper and discussed the matter with company counsel (R. 200, 201, 205).

The statement contained in this paragraph of the petition to the effect that these discharges or terminations did occur within a short time of each other is true. But Blue Boar had prepared and introduced in evi-

dence, an exhibit showing the employee terminations during the period March 1 through August 15, 1952. This was Plaintiff's Exhibit No. 6 and appears in the Record at pages 232-235. In addition to that, there was introduced in evidence, Plaintiff's Exhibit No. 7 which constituted a recapitulation of the terminations between May 1 and August 15, 1952. This appears on pages 236 and 237 of the Record. A glance at these uncontroverted exhibits will clearly indicate that there were no more separations during the two-week period May 25-June 8, than in any other period covered by the exhibit. During that time there were fourteen separations of which six were voluntary and eight involuntary.

Again on page 12 of the petition, a completely erroneous statement is made.

> "The injunction ordered by the Court of Appeals enjoined all picketing of any sort whatsoever. It did not, as in the case of *Building Service Employees* v. *Gazzam,* 339 U. S. 532, enjoin picketing for a specific unlawful purpose. Nor did the Kentucky Court distinguish between legitimate picketing and abusive picketing. Instead it broadly enjoined all picketing, peaceful or otherwise, for a legitimate purpose or for an illegitimate purpose."

It is hard to conceive a more distorted picture of the opinion of Judge Stewart of the Court of Appeals than this bald statement made by petitioners. Throughout the decision, the Court was extremely careful to point out that the injunction granted was strictly limited to the factual situation "in this case." As a matter of fact, in the opinion (254 S. W. 2d 335, 336,

338, 339; R. 48, 53, 55, 56) this language is repeated: "Under the facts of this case"; again "applicable to the facts of this case"; "We now come to the question of whether picketing in this case has been and is now illegal because its purpose is to coerce Blue Boar to violate the law of this state as set forth in KRS 336.130"; "but, when we set it up against the factual background of this case"; and in the concluding paragraph this language is found:

> "We therefore conclude that the picketing in this case would, if allowed, result in coercing Blue Boar to resort to compulsion to force its employees to join the union in violation of KRS 336.130."

It is thus apparent that the Court of Appeals has very narrowly limited its decision to the facts of this case and has found that under these facts the picketing was for an unlawful purpose and hence enjoinable.

Now the petitioners devote some ten pages to outlining the facts. The distortions in such an outline become readily apparent when their statement is compared with the analysis of the facts found in the opinion of the Court of Appeals (254 S. W. 2d 335-337; R. 49-51).

COUNTER-STATEMENT OF QUESTIONS PRESENTED.

On pages 15 and 16 of the petition, there are set up four so-called questions which the petitioners ask this Court to determine. Seldom have we seen more loaded questions. Questions 1, 2, and 4 relate to a hypothetical situation where a state court has forbidden "all peace-

ful picketing." The third question is likewise objectionable in that it relates to a hypothetical situation. Accordingly, we desire to restate the questions as we deem them to exist in this case. There are only two, they are:

1. **Have the petitioners properly raised a Federal question in the courts below and has the Kentucky Court passed on that Federal question? If so, was its decision on the Federal Question necessary to the determination of the cause?**

2. **Assuming the Federal question to have been properly raised and to have been passed on, is the decision of the Kentucky Court violative of recent decisions of this Court?**

If the answer to either of these question is "no," then this petition must be denied.

ARGUMENT AND LAW.

I.

This Petition Must Be Denied as Petitioners Raised No Federal Question in the Court Below, and the Kentucky Court Passed on No Federal Question.

Petitioners contend that jurisdiction is conferred on this Court by Section 344 of the Judicial Code (United States Code, Title 28, Section 1257(3), June 25, 1948, c. 646, 62 Stat. 929) (Pet. 15).

To support this contention petitioners state that "the titles, rights, privileges and immunities of petitioner under the Constitution of the United States," which are involved in the instant cause, were set out by petitioner in (Pet. 16):

(a) affidavit of Elgin G. Bartlett (R. 78-81)
(b) briefs and arguments on temporary and permanent injunction and on appeal (Not in record)
(c) petition for rehearing (R. 57-70).

Petitioners also state that in the trial court and the Court of Appeals "the Federal question was assumed to be at issue and was actually decided by each of those Courts, and was necessary to their judgments and decrees" (Pet. 16, 17).

With this statement petitioners rest their case on the matter of jurisdiction.

Petitioner filed only two pleadings, an answer and an amended answer and neither sets up any Federal question (R. 17, 18, 20, 21). They also filed a motion to dissolve the temporary injunction which motion appears nowhere in the Record. The order overruling this motion simply states "it is ordered that this motion be, and it is, hereby overruled" (R. 17).

The Judicial Code section under which petitioners seek certiorari authorizes such "where any title, right, privilege or immunity is *specially set up or claimed* by either party under the Constitution * * * of the United States." (Emphasis supplied.)

This section and other sections relating to review or appeal have been repeatedly construed by this Court. In a recent case, *Wilson* v. *Cook,* 327 U. S. 474, 480, 90 L. Ed. 793, 799, this Court stated:

> "The purpose of this requirement is to restrict our mandatory jurisdiction on appeal * * * and to make certain that no judgment of a state

> court will be reviewed on appeal by this court unless the highest court of the state has first been apprised that a state statute is being assailed as invalid on federal grounds, * * * or, when the statute, as applied, is so assailed, until it has opportunity authoritatively to construe it * * *. This jurisdictional requirement is satisfied only if the record shows that the question of the validity under federal law of the state statute, as construed and applied, has either been presented for decision to the highest court of the state, * * * or, has in fact, been decided by it, * * * and that its decision was necessary to the judgment. * * * The record in this case does not disclose that at any time in the course of the proceedings in the state courts plaintiff asserted the invalidity of a state statute on any federal ground."

This Court has stated that this provision means the Federal question must be set up by "pleading motion, or other appropriate action under the state system of pleading and practice." In *Hartford Life Insurance Co.* v. *Johnson,* 249 U. S. 490, 493, 63 L. Ed. 722, 724, it is stated:

> "It is settled law that this provision means, 'that the claim must be asserted at the proper time and in the proper manner by *pleading, motion, or other appropriate action under the state system of pleading and practice,* * * * and upon the question whether or not such a claim has been so asserted, the decision of the state court is binding upon this Court when it is clear, as it is in this case, that such decision is not rendered in a spirit of evasion for the purpose of defeating the claim of federal rights!" (Emphasis supplied.)

In Kentucky the rule has always been that a Federal question, or, for that matter, any question, a re-

view of which is sought in the Court of Appeals, *must be raised in the trial court in writing either by pleading or motion.* In *Louisville & N. R. Co.* v. *Woodford,* 152 Ky. 398, 153 S. W. 722, 727, 728, it is stated:

> "It is an elementary rule, of almost universal application, that questions not raised in the trial court in some effective and appropriate manner will not be considered on appeal * * *. It may be considered as well settled in this jurisdiction that no error committed during the trial is available upon appeal, unless it has been specifically relied upon in the grounds set forth in support of a motion for new trial. * * * and this is true although objection was made and exception taken to the ruling at the proper time, as was done in this case. * * *
>
> "The office of the pleadings is to make plain the issues between the parties and upon the issues thus raised, the parties are entitled to have the case tried.
>
> "Bearing in mind these elementary rules of pleadings and practice, and turning first to the pleadings, we find no Federal question suggested anywhere. * * *
>
> "In view of the fact that the question had been nowhere raised by the pleadings, instruction, or a motion for a new trial, or by motion of any kind, we must conclude that it was raised orally, and was discussed as an academic question. But, under section 115 of the Civil Code of Practice, pleadings are required to be in writing; by subsection 5 of section 317, instructions must be in writing; and under subsection 1 of section 624, even notices are required to be written. A mere oral request of the trial court to instruct upon any given question brings no question before this Court for review. * * *

> "The Federal question now suggested was not raised in the trial court, is not before us for review, and cannot be considered or decided."

This same case was heard again by the Court of Appeals and is reported at 153 Ky. 185, 154 S. W. 1083. Again the Court stated:

> "The defendant having failed to plead the provisions of the written contract relied on, there was nothing which the Court could consider to sustain the Federal question on the argument of the motion for a new trial. The matter not having been presented in the Circuit Court in such a manner that it could be considered in that court, and the case having been tried in that Court without reference to any of the special provisions of the contract, the defense now suggested is not maintainable in this Court."

This case was even carried to this Court on writ of error and was dismissed because of failure to raise the Federal question. 234 U. S. 46, 51, 58 L. Ed. 1202, 1208. Mr. Justice Day, speaking for the Court, said:

> "If a Federal question can be said to be involved at all, it was introduced into the record upon the argument of the motion for a new trial. Disposing of that question, the Court of Appeals of Kentucky set forth that the question was not raised by the pleadings or requested instructions, or by motion for a new trial, or written motion of any kind, and concluded that it must have been raised orally. It pointed out that under the Kentucky Code of Practice such contentions were required to be in writing, and that if the defendant desired to take advantage of its limited liability, it must, under the Code of the state, specifically rely on the defense in its answer. In making this

holding, the Kentucky court but enforced a rule of practice of that state. The decisions of this Court not only have repeatedly held that a federal right, in order to be reviewable here, must be set up and denied in a state court, but have often held that such claim of denial is not properly brought to the attention of this Court where it appears that the state court declined to pass upon the question because it was not raised in the trial court, as required by state practice. * * *

"It follows that the case must be dismissed for want of jurisdiction."

Applying this rule to petitioners, we find that the only part of the Record in the trial Court in which the Constitution is mentioned is in paragraph 14 of the affidavit of Elgin B. Bartlett (Pet. 16; R. 78-81):

> "The sole purpose of the handbills, signs and picketing of plaintiff's premises was and is to publicize the controversy between plaintiff and Local No. 181, as such of the defendants as participated therein had a right to do so under the Constitution of the United States and for no other purpose."

This statement in affidavit form obviously is meaningless insofar as raising any Federal question. It merely represents an opinion of the affiant which is clearly objectionable as incompetent and irrelevant even had it been made on the witness stand under oath. This was recognized by the trial court in its order and judgment (R. 131) where it is stated:

> "At that time the parties, by counsel, stipulated and agreed that the Court should consider on the plaintiff's motion to make the injunction permanent and on the defendants' application to dissolve the temporary injunction and dismiss the petition,

> all of the evidence, affidavits and exhibits heretofore filed in connection with the application for the temporary injunction subject to *competency and relevancy.*" (Emphasis supplied.)

Petitioners' assertion that the Federal question was raised in briefs and arguments before the courts is equally specious. These briefs and arguments form no part of the Record and are not before this Court.

Recognizing that they had not raised a Federal question, petitioners asked the Kentucky Court in their petition for rehearing to "clearly show that a basic Federal Constitutional question" is involved in the decision (R. 70). This the Court declined to do.

Petitioners next urge that the petition for rehearing itself supplies the missing jurisdictional element. This contention likewise must fail. The Kentucky Court merely denied the petition in this language (R. 71):

> "The Court being sufficiently advised, it is considered that the petition of appellees for a rehearing be and the same is overruled."

This Court has repeatedly held that a Federal question is raised too late on a petition for rehearing unless the court below expressly entertains and passes on it. In *McCorquodale* v. *Texas,* 211 U. S. 432, 437, 53 L. Ed. 269, 270, this Court passed on the identical question and stated:

> "This Court has decided many times that it is too late to raise a Federal question for the first time in a petition for rehearing in the court of last resort of a state after that court has pronounced its final decision. * * * It is true that we have

> also decided that, if the court entertains the motion and passes on the Federal question, we will review its decision. But, it must appear that the court has done so. * * * It can hardly be said to so appear in the case at bar. The order of the Court is nothing more than denial of the motion. In other words, it expresses no more than would be implied from a simple denial of the motion."

In a more recent case this Court has reiterated this rule, *Radio Station WOW, Inc.* v. *Johnson,* 326 U. S. 120, 128, 89 L. Ed. 2092, 2100.

> "Questions first presented to the highest State court on a petition for rehearing come too late for consideration here, unless the State court exerted its jurisdiction in such a way that the case could have been brought here had the question been raised prior to the original disposition."

Having failed to show that the Federal question was raised, nevertheless, petitioner urges that in both the trial court and the Court of Appeals "the Federal question was assumed to be at issue and was actually decided by each of those courts, and was necessary to their judgments and decrees" (Pet. 16, 17).

Nothing could be further from the facts. The Court of Appeals made it crystal clear that it decided this case solely on the *non-federal* ground that the activity, if not enjoined, would violate KRS 336.130.

At the beginning of the opinion is stated (254 S. W. 2d 335; R. 48):

> "The primary question on this appeal is whether picketing under the facts of this case would require appellant, hereinafter referred to as 'Blue Boar', to coerce its employees to join

appellee, called herein, 'The Union', in violation of KRS 336.130."

After analyzing the factual situation beginning September 16, 1949, and continuing to the time of this appeal, the Court stated (339; R. 55):

> "We now come to the question of whether picketing in this case has been and is now illegal because its purpose is to coerce Blue Boar to violate the law of this state as set forth in KRS 336.130."

In its concluding paragraphs, the Kentucky Court summarized the argument of the Union and made its decision (339; R. 55, 56):

> "The Union argues that, even assuming a labor controversy does not exist between it and Blue Boar, peaceful picketing is nevertheless allowable *under the laws of this state* where the sole purpose of such activity is to advertise to the public that it has a labor controversy with Blue Boar. If the picketing is considered in isolation, we could easily arrive at the conclusion that this assertion might have some merit; but, when we set it up against the factual background of this case, it forms part of a pattern which clearly shows that the union has employed methods, from the very beginning, which we think could have had no other effect than to coerce Blue Boar to compel all of its employees to organize. * * * We therefore conclude that the picketing in this case would, if allowed, result in coercing Blue Boar to resort to compulsion to force its employees to join the union in violation of KRS 336.130.
>
> *"In view of our decision, it becomes unnecessary to consider the other ground urged for reversal."* (Emphasis supplied.)

Thus the Kentucky Court explicitly stated that it was deciding the case on the non-federal ground and was not considering the federal ground. Even had it not done so it would have been incumbent on this Court to determine from the record (1) that the Federal question was presented, (2) that the decision was based on the Federal question, and (3) the decision of the Federal question was necessary to the determination of the cause. *Honeyman* v. *Hanan,* 300 U. S. 14, 18, 81 L. Ed. 477, 479.

In *McGoldrick* v. *Gulf Oil Corp.,* 309 U. S. 2, 3, 84 L. Ed. 536, this Court stated:

> "In the absence of an explicit statement by the Court of Appeals that it annuls the assessment of the tax solely because of violation of the Federal Constitution, we are unable to find that the decision of the highest court of the State did not rest upon an adequate non-federal ground. * * * The writ of certiorari is dismissed for the want of jurisdiction."

Summarizing, this Court must dismiss this petition because the petitioner specially set up no Federal question in the courts below and the Kentucky Court expressly based its decision on the non-federal ground and did not consider any Federal question.

II.

Even Had a Federal Question Been Properly Raised and Decided This Court Should Deny This Petition.

The controversy between Blue Boar and the Union in the words of the Kentucky Court had its "genesis on September 16, 1949," when demands were made by officers of the Louisville Federation of Labor that Blue Boar sign a contract with petitioner. The facts of that controversy beginning September 16, 1949, and continuing until July 14, 1950, when the Court of Appeals, five judges sitting, refused to dissolve the temporary injunction, are concisely set forth in the opinion of the Court (254 S. W. 2d 335-337; R. 49-51).

For almost two years this case lay dormant. On June 6, 1952, the Union filed an answer and later an amended answer. These were the only pleadings filed by petitioners. They asserted (a) a labor dispute now existed between Blue Boar and the Union and (b) that Blue Boar had discharged five employees because of union activity.

The Chancellor found at the conclusion of this hearing that these employees were discharged for reasons other than union activity. The Court of Appeals stated (336; R. 51):

> "We think the proof amply sustains this finding by the Chancellor."

Kentucky Statutes guarantee employees the right of self organization free from restraint or coercion, KRS 336.130 provides:

"(1) Employes may, free from restraint or coercion by the employers or their agents, associate collectively for self-organization and designate collectively representatives of their own choosing to negotiate the terms and conditions of their employment, to effectively promote their own rights and general welfare. Employes, collectively and individually, may strike, engage in peaceful picketing, and assemble collectively for peaceful purposes.

"(2) Neither employers or their agents, nor employes or associations, organization or groups of employes, shall engage or be permitted to engage in unfair or illegal acts or practices or resort to violence, intimidation, threats or coercion."

The Court of Appeals, looking to the substance rather than to the claim of the Union, found, in its own words that the union activity here involved (339; (R. 56):

"forms part of a pattern which clearly shows that the Union has employed methods, from the very beginning, which we think could have had no other effect than to coerce Blue Boar to compel all of its employes to unionize. There is abundance of proof to establish the fact that pressure has been exerted on Blue Boar to compel it to sign a contract with the Union and to recognize the Union as a sole bargaining agent for all its employees. Had Blue Boar entered into this contract and lived up to its terms, its employes would have been coerced by it to join the Union regardless of their wishes. * * *"

This Court, in the recent case of *Local Union No. 10, AFL* v. *Graham,* 345 U. S. 192, 97 L. Ed. (Adv. page 542), determined that peaceful picketing could be enjoined by the Supreme Court of Virginia, where the

effect of such picketing was to violate the public policy of Virginia declared in its so-called "right to work" statute.

In *Building Service Employers International Union* v. *Gazzam,* 339 U. S. 53, 94 L. Ed. 845, this Court unanimously held that the Supreme Court of the State of Washington, relying upon a state public policy as expressed in its statutes that workers shall be free to join or not to join a union and that they shall be free from coercion, interference or restraint, could enjoin peaceful picketing, the effect of which picketing would be to violate this declared public policy of the State.

Handed down on the same day and to the same general effect were the cases of *International Brotherhood of Teamsters Union* v. *Hanke,* 339 U. S. 470, 94 L. Ed. 995; *Hughes* v. *Superior Court of California,* 339 U. S. 460, 94 L. Ed. 985.

This Court has this year also denied certiorari in a case almost identical with this case. *International Brotherhood of Teamsters* v. *Postma,* docket No. 446, October term 1952. Certiorari was denied — U. S. —, 97 L. Ed. (Adv., p. 668), and Petition for Rehearing denied — U. S. —, 97 L. Ed. (Adv., p. 851). In the Postma case as in this case the declared public policy of the State of Michigan was that employees should be free to join or not to join any labor organization. The Michigan Supreme Court enjoined peaceful picketing the effect of which would have been and was to violate this declared public policy. This denial of certiorari followed in point of time the decision in the Graham case.

The Kentucky Court of Appeals decided this case solely on the non-federal ground that the effect of the picketing sought would be in violation of the legislatively declared public policy that workers shall be free from coercion by their employer in the matter of self-organization.

Admittedly in the past there has existed some confusion in the state courts since the decision of this Court in *A. F. of L.; et al.* v. *Swing,* 312 U. S. 321, 85 L. Ed. 855. However, recent decisions have served to clarify this. A succinct statement of the present law is found in the concurring opinion of Mr. Justice Frankfurter in the case of *Dennis* v. *United States,* 341 U. S. 494, 529, 95 L. Ed. 1137, 1163:

> "A critique of the cases testing restrictions on picketing is made more difficult by the inadequate recognition by the Court from the outset that the loyalties and responses evoked and exacted by picket lines differentiate this form of expression from other modes of communication. * * * But the crux of the decision in the Thornhill case was that a state could not constitutionally punish peaceful picketing when neither the aim of the picketing nor the manner in which it was carried out conflicted with a substantial interest. In subsequent decisions we sustained restrictions designed to prevent recurrence of violence, * * * or reasonably to limit the area of industrial strife, * * *. We held that a state policy against restraints of trade justified it in prohibiting picketing which violated that policy * * *; we sustained restrictions designed to encourage self-employed persons * * *; and to prevent racial discrimination * * *. The Fourteenth Amendment bars a state from prohibiting picketing when

> there is no fair justification for the breadth of the restriction imposed * * *. But it does not prevent a state from denying the means of communication that picketing affords in a fair balance between the interests of trade unionism and other interests of the community."

In the instant cause the Kentucky Court has balanced the interests of the petitioning Union which has been unable to show that it represents or has ever represented more than 5 out of 270 employees of Blue Boar (R. 43, 44, 49-51 [all five of these were discharged or their employment terminated for reasons totally dissociated with union activity (R. 31, 51)] against the interests of the Commonwealth of Kentucky in assuring that the Blue Boar employees are protected in the rights guaranteed them under law. After balancing these interests it concluded (254 S. W. 2d 339; R. 56):

> "That the picketing *in this case* would, if allowed, result in coercing Blue Boar to resort to compulsion to force its employees to join the Union in violation of KRS 336.130." (Emphasis supplied.)

This is a far cry from the wild and baseless accusations against the Kentucky Court made on pages 20-27 of the petition. Particular attention is directed to the fulminations contained on pages 26, 27 where these statements are found:

> "It follows then, that Kentucky has established a policy that in any case in which an employer refuses to recognize a particular Union and in which 100% of the employes do not belong to the

> Union, picketing will not be allowed,—a strike for recognition would similarly be illegal. * * *
>
> "The instant cause is a flagrant example of a state Court endeavoring to use that reasoning to trespass beyond the constitutional boundaries and protective barriers set up by this Court."

Such intemperate unfounded attacks upon the integrity of the Kentucky Court of Appeals, come with ill grace from a Union which has had two hearings before the Jefferson Circuit Court and two before the Court of Appeals.

Such groundless charges can serve no useful purpose. They add only friction and heat instead of light.

The Kentucky Court has balanced the interests of the Union and the Commonwealth and has determined that under "the facts of this case" an injunction against peaceful picketing is justified. Such a narrowly conceived restriction is entirely consonant with every decision of this Court and the petition should be denied.

CONCLUSION.

In conclusion, we submit that this petition for certiorari must be denied for the reason that petitioners raised no Federal question, nor was any Federal question decided.

Alternatively and not departing from that contention which we submit is uncontradicted on the record, we submit that the decision of the Kentucky Court, based as it is upon the narrow ground that picketing under the facts of this case violates the declared policy

of the Commonwealth of Kentucky, is entirely consistent with the decisions of this Court and that the petition should be denied.

We therefore ask that the prayer of the petition for writ of certiorari be denied.

Respectfully submitted,

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